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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 31

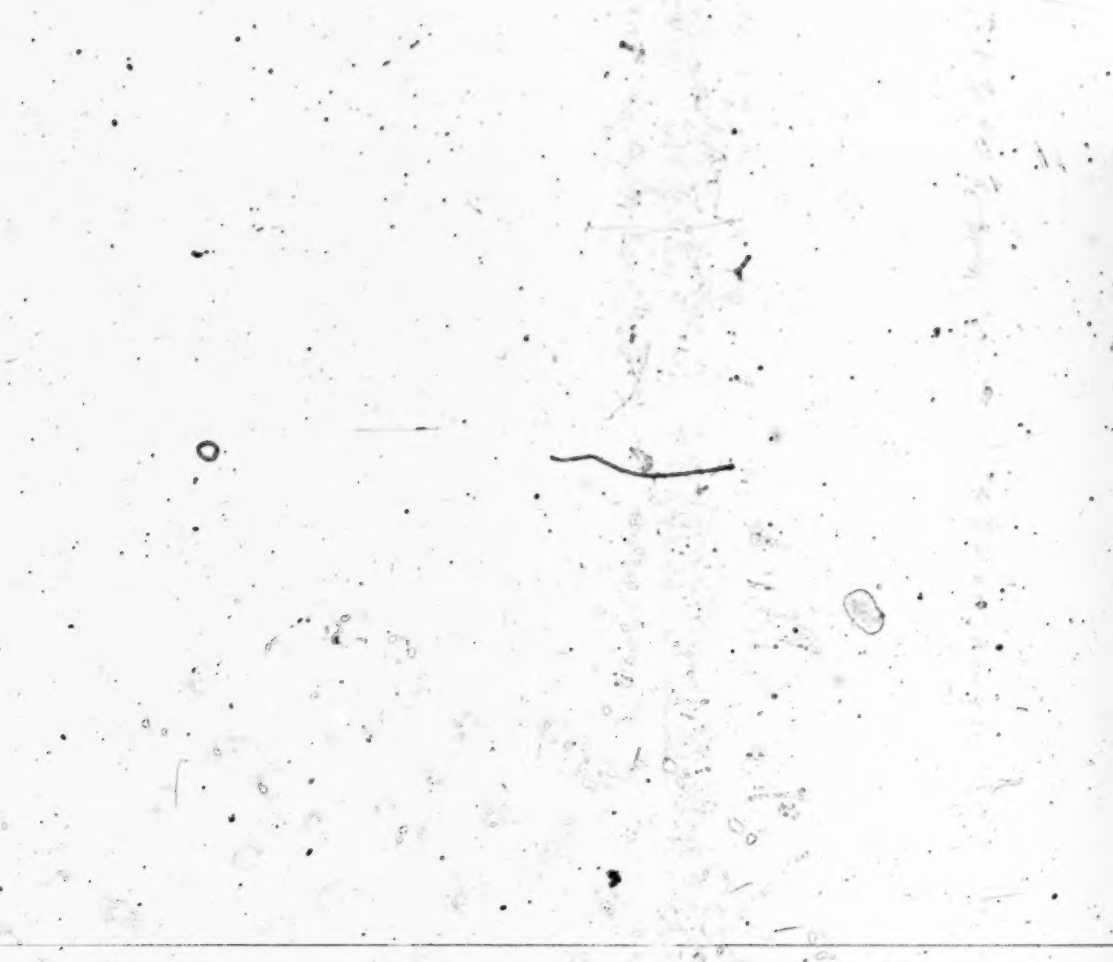
THE UNITED STATES, PETITIONER

vs.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1942
CERTIORARI GRANTED APRIL 13, 1942



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 982

THE UNITED STATES, PETITIONER

vs.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 43269

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC., A BODY CORPORATE

vs.

THE UNITED STATES

I. *History of proceedings*

The original petition was filed February 19, 1936.

On April 4, 1938, on motion made therefor, and allowed by the court, the plaintiffs filed their amended petition which is as follows:

II. *Amended petition*

Filed April 4, 1938

To the Honorable Judges of the Court of Claims of the United States:

Plaintiffs, Fred J. Rice and W. Cameron Burton, Receivers for D. C. Engineering Company, Inc., a body corporate, respectfully represent:

1

Plaintiffs, Fred J. Rice and W. Cameron Burton, are the duly qualified and acting Receivers of the D. C. Engineering
2 Company, Inc., a body corporate, appointed by order of the Supreme Court of the District of Columbia, in Equity Cause No. 56,546, dated February 7, 1934, and by further order of said Court, dated July 5, 1934, said Receivers are authorized and directed to institute this suit.

2

The D. C. Engineering Company, hereinafter called plaintiff Company, was incorporated under the laws of the District of Columbia, having its principal office and place of business in the City of Washington, District of Columbia, and its officers and stockholders are citizens of the United States.

Plaintiff Company has at all times borne true faith and allegiance to the Government of the United States of America and has in no way aided or abetted or given encouragement to rebellion against said Government.

3

As the result of successful bids submitted to defendant, plaintiff Company executed and entered into a contract with the defendant, dated April 29, 1932, the defendant being represented in the making and execution thereof by L. H. Tripp, Director of Construction, Veterans' Administration, called the Contracting Officer, for "the complete installation at Veterans' Administration Home, Togus, Maine, of Plumbing, Heating, and Electrical Work, including all Outside Distribution Systems, excepting outside sewers and heating," at the stated contract price of Eighty-nine Thousand Five Hundred Dollars ($89,500.00). By subsequent changes in said contract in which certain additions to and deductions from the original contract price were mutually agreed upon between the parties, said contract price was reduced by Eleven Hundred Twenty-one Dollars and Eighteen Cents ($1,121.18), to a total of Eighty-eight Thousand Three Hundred Seventy-eight Dollars and Eighty-two Cents ($88,378.82).

4

Plaintiff Company fully and completely performed in accordance with the provisions of said contract and the specifications, schedules, and drawings forming a part thereof, all of the work required to be done thereunder, which was duly accepted by the defendant. Whereupon, plaintiff Company became entitled to the full amount of compensation fixed and agreed upon in and by said contract, as amended, to wit, Eighty-eight Thousand Three Hundred Seventy-eight Dollars and Eighty-two Cents ($88,378.82), in addition to further amounts hereinafter set forth.

5

Said contract of April 29, 1932, provided, among other things, that "The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided in the contract for General Construction."

Said notice to proceed, as contemplated in said contract, was given by letter of the Veterans' Administration, signed by said L. H. Tripp, the Contracting Officer, to the L. C. Engineering Company, dated May 12, 1932, reading as follows:

"You are hereby notified to proceed with the installation of Plumbing, Heating, and Electrical Work at Veterans' Administration Hospital, Togus, Maine, as contemplated by Contract VAc-196, dated April 29, 1932, your copy of which is attached. The performance bond signed by you and the Globe Indemnity

Company, 150 William Street, New York City, N. Y., in support of this contract, has been approved and is on file with the Service record of this agreement.

4 "It will be noted that the contract provides for completion of the work at a date not later than that provided for in the contract for General Construction. The General Construction work is due for completion within 250 Calendar Days after May 9, 1932."

6

Pursuant to said notice, plaintiff Company made immediate preparations for commencement of work under the contract and on June 4, 1932, plaintiff's superintendent in charge of said job established offices in Togus, Maine, and on or about said date large supplies of materials, tools, and working equipment were forwarded to Togus, Maine. Plaintiff Company was prepared to immediately commence and diligently prosecute its work under said contract on said date.

However, because of faulty foundations, a condition over which plaintiff Company had no control and for which the defendant was responsible, requiring a complete relocation of the building and necessitating numerous changes in the plans and specifications, actual construction work on said building could not and did not commence until October 8, 1932.

During the period from June 4, 1932, to October 8, 1932, plaintiff Company was required to and did remain on the job and hold itself in readiness to commence construction work at any time. Despite numerous and repeated requests by plaintiff Company of defendant and its Contracting Officer, for instructions and information as to the commencement of construction work, no definite information or instructions were received, other than said notice of May 12, 1932, to commence work immediately, but it was impossible for plaintiff Company to commence its work until October 8, 1932, when general construction work on the building was started.

5 7

As the result of said delay in the commencement of building construction, for which plaintiff Company was not in any wise responsible and which was in violation of said contract and constituted a breach thereof by defendant, plaintiff Company suffered severe loss and damage, by reason of the necessity for maintaining its staff and equipment at Togus, Maine, during the period from June 4, 1932, to October 8, 1932, and by reason of the fact that whereas said contract contemplated the completion of the outside work, on said building

during the summer and fall months of 1932, said work was commenced and continued during the severe winter months, at considerable additional expense and cost to plaintiff Company, all to the loss and damage of plaintiff Company in the sum of Twenty-nine Thousand Six Hundred Twenty-five Dollars and Fifteen Cents ($29,625.15).

8

Plaintiff Company performed said work under said contract and said work was accepted by the defendant, acting through its officers and agents authorized to accept the same, and the defendant received and has ever since enjoyed the benefit thereof at the expense of and damage to plaintiff Company. Plaintiffs aver that defendant is responsible for all of the expense and costs to which plaintiff Company was subjected, as hereinabove set forth, whereby and by reason of which an obligation arose and still exists on the part of defendant to pay plaintiff Company just and reasonable compensation therefor. Plaintiff Company, however, has not been paid for on account of any of said expense and costs.

9

Said contract of April 29, 1932, further provided in Article 9 thereof for the assessment of liquidated damages in the amount fixed by the specifications, at $70.00 per day, for each day the completion of said building was delayed by the plaintiff Company. Article 9 provided for the determination of said liquidated damages as follows:

"Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto."

10

Upon completion and acceptance of said building on October 21, 1933, the time for completion thereof under the contract having been extended by defendant to August 14, 1933, final payment was made to plaintiff Company in the sum of Seven Thousand Six Hundred and eight Dollars and Eighty-seven Cents ($7,608.87), representing a total payment to plaintiff Company on said job of Eighty-six Thousand Four Hundred Eighteen Dollars and Eighty-two Cents ($86,418.82), the sum of Nineteen Hundred and Sixty Dollars ($1,960.00) having been deducted from the final payment due plaintiff Company
7 as liquidated damages for twenty-eight (28) days delay under said paragraph 9 of the contract.

Plaintiffs aver that plaintiff Company was not in any manner responsible for the alleged delay of twenty-eight (28) days for which said erroneous and wrongful deduction of Nineteen Hundred and Sixty Dollars ($1,960.00) was made. Plaintiffs aver that said delay was due to unforeseeable causes beyond the control and without the fault of plaintiff Company, as admitted by letter received by plaintiff Company from the Veterans' Administration, signed by said L. H. Tripp, the Contracting Officer, dated October 21, 1933, reading in whole as follows:

"Under contract VAc–196 dated April 29, 1932, you were required to install the Plumbing, Heating, and Electrical Work specified in connection with buildings constructed under contract VAc–193 by Morley Construction Company (Chas. Smith & Sons Construction Co.), contractor for the General Construction work at Veterans' Administration Facility, Togus, Maine, and to complete the work at a date not later than that provided for in the contract for General Construction, which was originally January 14, 1933, and has been extended to August 14, 1933. It is noted that your progress was delayed by the General Construction work and that your contract work was not completed until October 1, 1933.

"Under Article 9 of the contract, I have ascertained the facts and extent of this delay and find (1) that the nature of your contract work was such that it could not proceed at a more rapid rate than the general construction work which was being performed by the Government under contract VAc–193, (2) that your contract work was completed October 1, 1933, which is the date when the general construction work was completed, and (3) that the entire delay in the completion of your contract work, amounting to Forty-Eight (48) Calendar Days after
8 August 14, 1933, was caused by the General Construction

work which was being performed for the Government under contract VAc-193, thus constituting a delay due to unforeseeable causes beyond your control and without your fault or negligence."

Plaintiffs, therefore, claim of the defendant the further sum of Nineteen Hundred and Sixty Dollars ($1,960.00) for said wrongful deduction on account of alleged liquidated damages.

11

Neither plaintiffs nor plaintiff Company have made any assignment or transfer of the claim referred to herein or any part thereof or interest herein and plaintiffs are entitled to the full amount claimed after making proper allowance for all just credits and set offs.

Wherefore plaintiffs claim that they are justly entitled to recover the sum of Thirty-one Thousand Five Hundred Eighty-five Dollars and Fifteen Cents ($31,585.15), and accordingly pray judgment in their favor against the United States for said amount.

FRED J. RICE,
W. CAMERON BURTON,
Receivers for the D. C. Engineering Company, Inc.

9 [*Duly sworn to by W. Cameron Burton; jurat omitted in printing.*]

Construction contract dated April 29, 1932, between Veterans' Administration and The D. C. Engineering Company, Inc.

10 Standard Form No. 23. VAc-196
Approved by the President.
Nov. 19, 1926.

STANDARD GOVERNMENT FORM OF CONTRACT

(Construction)

VETERANS' ADMINISTRATION
(Department)

THE D. C. ENGINEERING COMPANY, INC.,
(Contractor)

1400 Spring Road, NW., Washington, D. C.

Contract for Plumbing, Heating, and Electrical Work,
Amount: $89,500.00

Place: Veterans' Administration Home, Togus, Maine

April 29, 1932

CONTRACT FOR CONSTRUCTION

This Contract, entered into this Twenty-ninth day of April 1932, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and The D. C. Engineering Company, Inc., a corporation organized and existing under the laws of the District of Columbia, of the city of Washington, in the District of Columbia, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for the complete installation at Veterans' Administration Home, Togus, Maine, of Plumbing, Heating, and Electrical Work, including all Outside Distribution Systems, excepting outside sewers and
11 heating, for the consideration of Eight-nine Thousand Five Hundred Dollars ($89,500.00) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications for Hospital Building for Veterans' Administration Home at Togus, Maine, March 12, 1932, and the schedules and drawings mentioned therein; Addendum No. 1 dated April 6, 1932; as contemplated by Item II of the Contractor's proposal dated April 19, 1932, and letter of acceptance dated April 29, 1932.

The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for General Construction.

ARTICLE 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly.

No change involving an estimated increase or decrease of
12 more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

ARTICLE 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction.

Rejected workmanship shall be satisfactorily corrected and
13 rejected material shall be satisfactorily replaced with

proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, wherever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifi-
14 cations and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

ARTICLE 7. Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting offi-

cer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

ARTICLE 8. Superintendence by contractor.—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

ARTICLE 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete
15 said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor,

including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

ARTICLE 10. Permits and care of work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

ARTICLE 11. Eight-hour law—Convict labor.—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

ARTICLE 12.—Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona

fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

ARTICLE 13.—Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ARTICLE 14. Officials not to benefit.—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. Payments to contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the con-

tractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

ARTICLE 17. Additional security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

ARTICLE 18. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

ARTICLE 19. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

19 In witness whereof, the parties hereto have executed this contract as of the day and year first-above written.

THE UNITED STATES OF AMERICA,

By L. H. TRIPP,

Director of Construction, Veterans Administration.

(Official title)

L. A. WARREN,

Attest:

F. R. PITMAN, *Secretary.*

[CORPORATE SEAL] THE D. C. ENGINEERING CO., INC.,

Contractor.

H. E. HUNTSBERRY, *President,*

1400 Spring Road N. W., Washington, D. C.

(Business address)

I, F. R. Pitman, certify that I am the secretary of the corporation named as contractor herein; that H. E. Huntsberry,

who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

F. R. PITMAN. [CORPORATE SEAL]

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, ——— who signed this contract for the ——— had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

Contracting Officer.

This contract is authorized by the acts of World War Veterans' Act, 1924, as amended.

20 Directions for Preparation of Contract

1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.

2. There shall be no deviation from this standard contract form, except as provided for in these directions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions, or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled "Alerations" before signing. This article is not to be construed as general authority to deviate from the standard form. Deletion of the descriptive manner not applicable in the preamble need not be noted in the article entitled "Alterations."

3. The blank space of Article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

4. If it is deemed necessary to include an article on Patents the Invitation to Bidders shall so state and the following article be used:

ARTICLE —. Patents.—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specification, the use of which the contractor does not control.

5. Where only one payment is contemplated, upon completion of the contract, all except paragraph (d) of Article 16, "Payments to Contractor," must be stricken out.

21 6. If approval of the contract is required before it shall become binding, the following article must be added:

ARTICLE —. Approval.—This contract shall be subject to the written approval of ———, and shall not be binding until so approved.

Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond, designation of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

9. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character

22 and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

12. The contracting officer must fill in the citation of the act authorizing the contract as indicated at the end of the last page of the contract.

13. The Invitation, Bid, Acceptance, and Instructions to Bidders are not to be incorporated in the contract.

14. The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract.

23 *III. General traverse*

Filed May 14, 1938

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

SAMUEL E. WHITAKER,
Assistant Attorney General.

G. F. F.

IV. Argument and submission of case

On February 6, 1941, the case was argued and submitted on merits by Mr. R. A. Bogley for plaintiffs, and by Mr. Elihu Schott for defendant.

25 *V. Special findings of fact, conclusion of law and opinion of the court by Littleton, J.; concurring opinions by Green, J., and Whaley, Ch. J.; dissenting opinion by Madden, J.*

Filed December 1, 1941

Mr. R. Aubrey Bogley for the plaintiffs.

Messrs. McKenney, Flannery & Craighill were on the brief.

Mr. Elihu Schott, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

Mr. Rawlings Ragland was on the brief.

Plaintiffs, as receivers, seek to recover $26,044.64 representing the total loss sustained by the D. C. Engineering Company under its contract with defendant for furnishing and installing plumbing, heating, and ventilating equipment at the Veterans' Administration Hospital Building constructed by the defendant under a separate contract at Togus, Maine.

The theory upon which plaintiffs seek to recover the amount stated is that defendant had agreed and was obligated to prepare the site and to construct the building in which the D. C. Engineering Company was to perform the work called for by its contract

within 250 days after commencement of construction operations in the spring of 1932; that inasmuch as the building was not ready for the work to be performed therein by the D. C. Engineering Company until October 8, 1932, or 149 days after plaintiff had been given notice to proceed, and plaintiff was further de-
26 layed for an additional period of 48 days at the end of the construction program, which required a total of 510 days, or 260 days in excess of the originally fixed period, the defendant is liable under its contract with the D. C. Engineering Company for the total excess cost of $26,044.64 alleged to have been caused by this delay.

Special findings of fact

1. Plaintiffs are the receivers of the D. C. Engineering Co., Inc., a District of Columbia corporation, having been duly so appointed by the Supreme Court of the District of Columbia February 7, 1934, and by that court authorized to institute and prosecute this suit.

Prior to March 12, 1932, the Government, through the Veterans' Administration, decided to construct a large Veterans' Hospital at Togus, Maine, known as Veterans' Administration Home, and to do all work necessary to complete the project by separate contracts for (1) general construction; (2) plumbing, heating, and electrical work; (3) electric elevators; and (4) a refrigerating plant. Accordingly, detailed specifications and drawings were prepared by the Government through the Veterans' Administration construction service for the four classes of work mentioned. The specifications for the entire project were in one volume. The general conditions set forth in the specifications were applicable to each contract to be entered into between the Government and the successful bidder for each classification of work, the single standard form of contract to be separately executed by each successful bidder for the classification of work covered by his bid, and the detailed specifications applicable thereto. The plans and drawings for the entire work to be performed by all the contracts with the Government either accompanied the specifications or were made available to all bidders. The standard form of contract subsequently entered into between the Government and each successful bidder contained at the time of execution only such additions as were necessary to describe the nature of the work to be performed thereunder and the contract price therefor.
27 March 12, 1932, an invitation for bids was prepared and issued in a single document for the four classifications of work, a copy of which, together with all the specifications for the entire project, was furnished to prospective bidders. This invitation for bids, so far as pertinent here, was as follows:

Sealed bids, in triplicate, subject to the conditions contained herein, will be received by the Veterans' Administration April 19, 1932, and then publicly opened for furnishing all labor and materials and performing all work required for constructing and finishing complete at Veterans' Administration Home, Togus, Maine, Hospital Building. This work will include excavating, roads, walks, and drainage, reinforced concrete, hollow tile, brickwork, cut stone, architectural terra cotta, slate stair treads, marble work, terrazzo floor and wall tile, rubber tile, compressed asphalt tile and linoleum floors, iron work, steel sash, steel stairs, steel shelving, cabinets and partitions, metal and built-up roofing, roof ventilators, skylights, lightning conductors, metal lathing, plastering, sound deadening, carpentry, metal weatherstrips, insect screens, linen chute, platform scales, painting, glazing, hardware, plumbing, refrigerating, heating and ventilating, electrical work, electric elevators, and outside distribution systems, and such other items as shown or specified. Separate bids will be received for (a) General Construction; (b) Plumbing, Heating, and Electrical Work; (c) Electric Elevators; and (d) Refrigerating Plant; all as set forth on bid form.

* * * * *

Bids must be submitted upon the Standard Government Form of Bid and the successful bidder will be required to execute the Standard Government Form of Contract for Construction.

Time of performance will be an essence of the contract and bids will be evaluated on the basis of time. In evaluating bids there will be added to each bid other than the one offering to complete in the shortest time an amount equal to the daily liquidated damages named in the Invitation for Bids, multiplied by the number of calendar days that such bidders have named for performance of the work in excess of the days named by the bidder proposing to do the work in the shortest time.

28 The invitation for bids, as well as paragraph 37 of the specifications and art. 9 of the standard contract form, provided that liquidated damages for delay by failure of the contractor to complete the work included in his bid within the time specified would be at the rate of $130 a day for "general construction"; $70 a day for "plumbing, heating, and electrical work"; $10 a day for "electric elevators"; and $10 a day for "a refrigerating plant."

As a part of the invitation for bids the Government, in writing, advised all prospective bidders that it was the general intention that the contractor for general construction would, unless otherwise specified, completely prepare the site for building operations and furnish all labor and materials required to construct and

finish complete as shown on the drawings, as described by the specifications, and as noted in his bid, upon which an award might be made, the one hospital building, and roads, walks, grading, and drainage, etc., and that the mechanical equipment covered by contracts made upon awards therefor under separate bids would be installed in the building as its construction progressed, as called for in the construction contract and specifications. Par. 7 of the specifications and art. 13 of the contracts provided that each contractor should fully cooperate with other contractors and carefully fit his own work to that provided under other contracts as might be directed by the contracting officer, and that no contractor should commit or permit any act which would interfere with the performance of work by any other contractor.

The bidder for general construction work of erecting the hospital building was required by the invitation for bids and the specifications to state the time within which such work would be completed, and time of performance was to be an essence of the contract between the Government and the contractor for general construction; the specifications relating to plumbing, heating, electrical work, and other mechanical work, provided that the general conditions set forth therein would govern where applicable all work in connection with plumbing, heating, and other mechanical work, and further provided as follows:

29 "Time for completion: All work under this section [plumbing, heating, etc.] of the specification shall be completed at at a date not later than that provided for in the contract for General Construction (see construction section of specification and bid forms for the completion of work under that contract). Failure to comply with the above will result in the deduction of liquidated damages from contract payments as hereinbefore provided under "General Conditions."

2. Chas. Smith & Sons, Inc., of Hartford, Conn., was the successful bidder for the work of constructing and finishing complete the hospital building, together with all roads, walks, grading, and drainage in connection therewith. On April 21, 1932, this company and the Government through L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, entered into the standard form of contract for this work for a total consideration of $374,000, and art. 1 of this contract provided that "The work shall be commenced within ten (10) calendar days after date of receipt of notice to proceed and shall be completed within two hundred and fifty (250) calendar days after date of receipt of notice to proceed."

On or shortly before April 19, 1932, the date specified in the invitation for bids issued March 12, 1932, the D. C. Engineering

Co., Inc., hereinafter referred to as plaintiff, submitted its bid for plumbing, heating, and electrical work called for by the specifications and drawings to be installed in the hospital building to be constructed by defendant under a separate contract, and stated that it would complete the same within the period fixed by the Government in its contract for general construction for a price of $89,500, in accordance with specifications, schedules, and drawings prepared and furnished by the Government. The printed Government bid form stated "The above bid is made with the understanding that all work covered thereby will be completed at a date not later than that provided in the contract for General Construction." Plaintiff's bid was accepted by the Government and, on April 29, 1932, the plaintiff and the United States, represented by L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, executed the standard form of contract, which, with the exception of description of the work to be performed thereunder, was, in all respects, identical with the contract between the Government and the contractor for the work of constructing the building.

3. May 9, 1932, the Government, through its contracting officer gave Chas. Smith & Sons, Inc., the contractor for general construction, notice to proceed, and on May 12 gave plaintiff written notice to proceed as follows:

You are hereby notified to proceed with the installation of Plumbing, Heating, and Electrical Work at Veterans' Administration Hospital, Togus, Maine, as contemplated by Contract VAc-196, dated April 29, 1932, your copy of which is attached. The performance bond signed by you and the Globe Indemnity Company, 150 William Street, New York City, N. Y., in support of this contract, has been approved and is on file with the Service record of this agreement.

It will be noted that the contract provides for completion of the work at a date not later than that provided for in the contract for General Construction. The General Construction work is due for completion within 250 Calendar Days after May 9, 1932.

Under these notices to proceed, the work of constructing the building and the work of furnishing and installing therein the plumbing, heating, and electrical equipment were due for completion January 14, 1933. The progress of plaintiff's work under its contract was dependent upon progress of the general construction work being performed by the Government under a separate contract.

4. At the time of preparing its bid, plaintiff, being aware of the importance to it of the period for performance under its contract if it was the successful bidder, conferred with the Director

of Construction of the Veterans' Administration, who was the Government's contracting officer, to determine when the work of constructing the hospital building would commence and the period of the year during which it would be prosecuted. The contracting officer advised plaintiff that construction work would commence in early spring of 1932 as soon as weather conditions would permit so that the building would be under roof and enclosed before cold weather set in during the following months. Plaintiff made its bid in reliance upon that advice and upon the basis of the provisions of the standard form of contract and the specifi-
31 cations. Plaintiff was ready to proceed and perform the work called for by its contract at all times on and after the date on which it received notice to proceed.

Plaintiff's contract provided in art. 1 that "The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for general construction." Art. 3 of plaintiff's contract and, also, of the contract between defendant and Chas. Smith & Sons, Inc., for general construction provided that the contracting officer might at any time by written order make changes in the drawings and specifications of the contract, or in either, and within the general scope thereof, and that if such changes caused an increase or decrease in the amount due under the contract, or in the time required for its performance, an "equitable adjustment shall be made and the contract shall be modified in writing accordingly"; that any claim for adjustment must be asserted within ten days from the date the change is ordered, unless the contracting officer should extend the time, and that if the parties could not agree upon the adjustment the dispute should be determined as provided in art. 15 of the contract; but that nothing in that article should excuse the contractor from proceeding with prosecution of the work so changed.

Art. 4 of both contracts provided that should the Government discover, during progress of the work, subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the contracting officer should promptly investigate the conditions and if he found that they materially differed from those shown on the drawings or indicated in the specifications he should at once make such changes in the drawings and specifications as he might find necessary, "and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

Art. 15 provided that all disputes concerning questions of fact arising under the contract should be decided by the contracting officer or his authorized representative, subject to appeal by the

contractor within thirty days to the head of the depart-
32 ment, whose decision should be final and conclusive upon the parties thereto as to such questions of fact, and that, in the meantime, the contractor should diligently proceed with the work as directed.

The defendant's specifications relating to excavation and foundation work in connection with construction of the building within which plaintiff was to install the mechanical equipment called for by its contract, and which specifications were furnished to plaintiff when bids were called for, provided (1 C–1, par. 2) that the contractor for general construction would clear the site of the building "and do all necessary excavating to the dimensions and levels shown on drawings for basements, areas, foundations, footings, walls, floors, and all work shown"; that should rock, within the definition of the specifications, be encountered within the limits of the required excavations payment for removal thereof would be made subject to such adjustment as provided by articles 3 and 4 of the contract; that only solid ledge rock or rock that could not be removed with pick or wedge, or boulders exceeding 12 cubic feet in bulk, should be considered as rock; that the bottom of all excavations for foundations should be properly leveled off and footings placed on undisturbed soil; that excavations should not be carried lower than required for footings, foundations, etc., as shown on the drawings; that work of excavating to the dimensions as shown on the drawings as required by the nature of the soil, or for additional construction, would be paid for as an extra in accordance with the contract. This specification further provided as follows:

Excavate to ledge for all piers, columns, footings, foundations, etc. The approximate location of ledge is shown on drawings. All supporting members, piers, walls, etc., must rest on solid rock ledge. The location of ledge shown on drawings is approximate, but as accurate as possible from available data. This contractor will remove all materials to ledge where required for all walls, piers, etc., under this contract but any ledge necessary to remove will be adjusted according to the contract. All bearing masonry shall rest on level beds on ledge. No sloping or rough rock beds will be permitted.

33 5. The defendant through its contractor for general construction started construction work immediately after May 9, 1932, and some time prior to June 4, 1932, plaintiff received notice from defendant's general contractor that sufficient progress on the general construction work would be made by June 6, 1932, to enable plaintiff to commence and thereafter prosecute its work. Upon receipt of this notice plaintiff proceeded to employ its superintendent and prior to June 4 it shipped to the site of the work

$2,500 worth of tools and equipment and several carloads of plumbing, heating, and electrical material to be installed in the building under its contract. On June 6 plaintiff's president and its superintendent arrived at the site of the work to begin operations, and, upon arrival, plaintiff found that 80 percent of the work of excavating for foundations of building had been done, but that, on that date, all work by the general contractor had been stopped by the defendant due to the encountering of subsurface conditions materially differing from those shown on the drawings and set forth in the specifications. The defendant, through its contractor for general construction had commenced excavation work May 11, but before June 6 changed conditions were encountered and the defendant discovered that the foundations for the building could not be constructed as shown on the drawings and as set forth in the specifications because of the fact that, over a large portion of the foundation area, instead of finding proper foundation bearings, as shown on the drawings and as stated in the specifications, soft sand, and a great deal of water and quicksand were encountered. Thereupon the contracting officer ordered all construction work stopped pending decision as to what should be done. All general construction work in connection with foundations for the building remained under suspension by order of the contracting officer from about June 4 until August 9, 1932. In the meantime, the defendant at its own expense carried on exploration work in connection with which numerous test pits were dug to much greater depths and dimensions than originally called for and numerous bearing tests were made therein for the purpose of ascertaining whether adequate foundation support could be secured on the original
34 site and for the purpose of securing the information necessary for preparation of new drawings to meet and overcome the conditions encountered in connection with the foundations of the building. A number of conferences were held and it was finally decided that because of the subsurface conditions, which had not been anticipated by anyone, the building could not be constructed within the lines of the original site and that its location would have to be changed so as to avoid the conditions encountered and prevent the large increase in costs of construction which would otherwise be necessary. Following the test excavations and the conferences, the contracting officer moved the location of practically the entire building. New plans and drawings were prepared and excavation for foundations of the building on the new location was commenced August 9, 1932.

Following the making of new plans and the relocation of the hospital building, the contracting officer issued certain written orders changing the contract for general construction and, under

articles 4 and 3 of that contract, made an equitable adjustment in the amount due under the contract due to the conditions encountered which resulted in a net increase of $103,489.49 in the contract price covering the general construction work. He also made an extension of time of 212 days to August 14, 1933, for completion of the building. The largest item in the equitable adjustments in price under the contract was $68,360.57 for costs, due to "extra work and delay," made necessary by the changed conditions encountered.

6. During the period from June 6 to August 6, 1932, while the general construction work was under suspension, plaintiff and the defendant's general contractor conferred with the contracting officer and other officials of the defendant. As a result of these conferences the contracting officer decided that work under the changed plans and at the new location should proceed forthwith regardless of approaching winter weather. At that conference plaintiff protested to the contracting officer that it should not be required to proceed with the work called for by its contract without extra compensation under conditions which would be encountered, different from conditions of performance as contemplated by its contract, and insisted that an equitable adjustment be made by the contracting officer under articles 4 and 3 of its contract increasing its contract price so as to meet the increased cost due to delay and the new conditions under which the work would have to be performed, i. e., during winter weather of 1932–1933 when the building would not be under cover and enclosed. But the contracting officer held and advised plaintiff that as no actual construction work had been performed by it under its contract up to that time no adjustment in the contract price by way of extra allowances could be awarded and that plaintiff would either have to give up its contract and forfeit its bond or complete the work as called for under its contract as the building was made ready therefor, and make claim in the United States Court of Claims for any excess costs incurred.

7. By October 8, 1932, the defendant through the contractor for general construction had completed the foundation footings and, on that date, directed its general contractor to commence pouring concrete for the building structure. On that date plaintiff for the first time was able to commence work under its contract. For a time thereafter the only work which plaintiff could perform was that of locating and placing pipe sleeves and outlets. The work of actually installing the plumbing and heating equipment followed later, when building construction had sufficiently progressed for that purpose. The hospital building under construction except for the delay from June 4 to October 8, 1932, for which plaintiff was in no wise responsible,

would have been under roof and generally enclosed before the beginning of cold and winter weather in 1932–1933. Seventy-five percent of the work to be performed by plaintiff under its contract was such as could be done along with the early general construction work as contemplated by the contract, before the building was under roof and generally enclosed. This work therefore could have been completed prior to winter weather had there been no delay in the work of constructing the building. The months of October and November 1932 were cold with some freezing weather, particularly in the latter month, and there was practically continuous freezing and subfreezing
36 weather during December 1932 and the months of January, February, March, and early April, 1933. The efficiency of plaintiff's mechanics and laborers engaged in plumbing and heating work was reduced 50 percent by reason of having to perform the work in freezing and near-freezing weather in the cold and winter months rather than in the summer and fall months as originally contemplated by plaintiff's contract, which would have been the case had the delay above-mentioned not occurred. The lowered efficiency of plaintiff's workmen, due to the changed conditions under which it was necessary to perform the work, resulted in additional labor costs to plaintiff of $5,192.49. The salary of plaintiff's superintendent on the job during the period of delay prior to October 8, 1932, of 126 days, was $1,170. During this period it was necessary for plaintiff to have his superintendent at the site of the work. During this delay period of 126 days plaintiff's actual overhead expense, exclusive of profit and the salary of its superintendent was $2,987.46. The total of extra costs mentioned is $9,349.95.

8. The general construction work on the hospital building and the plumbing, heating, and electrical work called for by plaintiff's contract to be installed therein were completed and accepted by the defendant October 1, 1933. This represented a delay of 48 days from August 14, 1933, the date to which the contracting officer had previously extended the original period of 250 days for completion, due to the changed conditions as hereinbefore mentioned. During this period of 48 days, plaintiff's expense for wages of its superintendent and foremen, in excess of the amount of such wages over a 250-day period, and for overhead was $3,073.08.

As to this delay in completion of the contract for general construction and plaintiff's contract, the defendant's contracting officer held upon substantial evidence before him that both the general contractor and the plaintiff had contributed thereto and found as a fact, among others, that delay of the general contractor was caused by plaintiff in the performance of the plumb-

ing, heating, and electrical work under its contract with the Government and that the delay of plaintiff was caused by the general construction work which was being performed by the
37 defendant under the general construction contract—thus constituting a delay due to unforeseeable causes beyond the control and without the fault or negligence of either contractor. In other words, the contracting officer found that each of the contractors had delayed the other during this 48-day period and he did not undertake to apportion the delay between them. His decision in this regard was not arbitrary or grossly erroneous. The contracting officer's final decision as to the delay to the contractor for general construction was made October 18, 1933, and his decision as to the delay to plaintiff was made on October 21, 1933.

9. As a result of the changed location of the hospital building, the contracting officer from time to time during performance of plaintiff's contract issued various orders for changes or extras under articles 3 and 5 of plaintiff's contract, the total of which resulted in a net reduction of $1,121.18 in plaintiff's contract price from $89,500 to $88,378.82. Certain minor defects which developed during the guarantee period under plaintiff's contract were corrected by the contracting officer at an expense of $559.64, further reducing plaintiff's original contract price to $87,819.18. Plaintiff was paid and has received from the defendant the last-mentioned amount of $87,819.18.

10. The actual cost to plaintiff of performing its contract, including overhead, plus profit at the rate of 8.5 percent on the original estimated cost of performing the plumbing, heating, and electrical work was $114,423.46, which is $26,044.64 in excess of the amended contract price of $88,378.82.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover $9,349.95.

It is therefore adjudged and ordered that plaintiff recover of and from the United States nine thousand three hundred forty-nine dollars and ninety-five cents ($9,349.95).

38 *Opinion*

LITTLETON, Judge, delivered the opinion of the court:

The D. C. Engineering Co., Inc., herein referred to as plaintiff, seeks to recover $26,044.64, representing its total excess cost of performance of work called for by its contract over the amended contract price of $88,378.82.

Plaintiff takes the position, in substance, that the whole of this excess cost resulted from and was attributable to an initial delay of 212 days and a subsequent additional delay of 48 days in defendant's general construction operations; that the 126 days' delay of the initial delay of 212 days was the result of failure of the defendant to have the general construction work ready for plaintiff's work within a reasonable time after receipt by plaintiff of notice to proceed, and that the 48 hours' delay at the end of the contract, beyond the original fixed period of 250 days as extended to August 14, 1933, was likewise due to failure of defendant to have the construction work sufficiently advanced to enable plaintiff to complete its work that much earlier and at less cost. The building constructed by defendant under a separate contract was completed 260 days late. Plaintiff therefore contends that this delay of the defendant made it impossible for plaintiff to proceed properly and satisfactorily so as to complete its work in the period and under the circumstances contemplated by its contract; that the delay was unreasonable in that it required plaintiff to perform its work under unanticipated conditions and circumstances which rendered the work more expensive than it otherwise would have been had it been performed as contemplated by both parties to the contract, and that the defendant is liable for the total extra cost of performance.

Plaintiff relies chiefly upon the opinion of this court in H. M. McCloskey, Jr., Inc. to the Use of U. S. Fidelity and Guaranty Co. v. United States, 66 C. Cls. 105, but the principle there applied upon the facts disclosed by the record is not altogether applicable here. In that case the facts showed that the Government simply failed to fulfill within a reasonable time its contract obligation to prepare and furnish the McCloskey
39 Company the site upon which it was to perform the work called for by its contract. We do not find that case to be authority for allowance of the full amount of the loss claimed in this case. The amount, if any, recoverable in each case depends upon proof as to the nature and extent of and responsibility for the delay or conditions giving rise to excess performance costs, and the amount of such costs as are attributable to such delay or conditions under which it became necessary for the work to be performed.

Under the facts disclosed by the record in this case, the provisions of plaintiff's contract, the representations of the contracting officer as to the period during which the general construction work would be performed, and the statements and representations in the specifications and drawings relating to all work upon the entire project, upon all of which plaintiff had a right to rely and did rely in making its bid, we are of opinion that plaintiff is entitled

to recover $9,349.95 of the total excess cost of $26,044.64 incurred. United States v. Smith, 94 U. S. 214, 217; Mueller v. United States, 113 U. S. 153, 156; Dermott v. Jones, 23 How. 220, 231, 233; O'Brien v. Miller, 168 U. S. 287, 297; Green County, Ky. v. Quinlan, 211 U. S. 582, 594; American Surety Co. v. Pauly (No. 1), 170 U. S. 133, 144; United States v. Spearin, 248 U. S. 132; Wood v. Fort Wayne, 119 U. S. 312, 321, 322; H. E. Crook Co., Inc., v. United States, (B–195), 59 C. Cls. 593.

Time was an essence of plaintiff's contract with the defendant and nowhere in plaintiff's contract or specifications or in defendant's contract and specifications for construction of the building in which plaintiff was to perform its work was the defendant relieved of responsibility for or liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way responsible. Par. 1 of plaintiff's specifications 1H–1 specifically directed plaintiff's attention to the specifications and bid form for construction of the building in which the mechanical equipment was to be installed. While it is true that in the invitation for bids and the specifications for plumbing, heating, and electrical work it was stated by defendant that this work would be required to be commenced promptly after date of receipt of notice to proceed and be completed at a date not later than that fixed by the defendant in the contract which was to be made for construction of the hospital building, the representations made were definite enough to fix the rights and liabilities of plaintiff and defendant in the event of a material deviation or change in the represented conditions or the period of performance giving rise to an increase or decrease in cost of performance. The period in which construction of the building would be commenced and completed was definitely fixed by the defendant on April 21, 1932, and plaintiff's contract making that period of 250 days the period within which the plumbing, heating, and electrical work should be completed was executed April 29, 1932. On May 12, 1932, the defendant gave plaintiff written notice to proceed stating that it would be required to complete the work called for by its contract at a date not later than 250 calendar days after May 9, 1932, or by January 14, 1933. Before making its bid for furnishing and installing the plumbing, heating, and electrical equipment in the building to be constructed by defendant, plaintiff was advised by the contracting officer for the defendant, who had charge of all work connected with the entire project, that the work of constructing the building in which this equipment was to be installed would commence in the early spring of 1932 as soon as weather conditions permitted so that the building would be under roof and enclosed before cold weather set in during the following months. Nowhere in the invitation for bids, the specifications, or the standard form

of contract, upon all of which, together with the representation of the defendant's authorized contracting officer, the plaintiff made its bid, is there to be found any provision, express or implied, that the Government was not to be responsible for or liable to plaintiff for excess cost or damage resulting from and attributable to delay in the work to be performed by defendant of constructing the building. For this reason the cases of Wood et al. v. United States, 258 U. S. 120; H. E. Crook Co., Inc., v. United States, 270 U. S. 4; G & H Heating Co. v. United States, 63 C. Cls. 164; Gertner v. United States, 76 C. Cls. 643, all of which involved
41 visions, are not in point here. See Cotton et al. v. United States, 33 C. Cls. 536, 548; Hyde v. United States, 38 C. Cls. 649; Miller v. United States, 49 C. Cls. 276, 282, 283; Edge Moor-Iron Co. v. United States, 61 C. Cls. 392, 396; Carroll et al. v. United States, 76 C. Cls. 103.

Plaintiff's contract and specifications did not contain a provision that the price set forth in the contract should cover all expenses of every nature connected with the work to be done and that the Government was to be relieved of any liability if the building structure was not furnished as contemplated and stated, so that plaintiff could proceed with and perform its work during the time and under the conditions contemplated by both parties without incurring excess costs by reason of delay in construction operations. And we think it may not be said in this case that the parties to the contract here involved understood that the Government was to be relieved of all responsibility for any excess costs by reason of plaintiff having to perform the work called for by its contract under circumstances and conditions differing materially from those contemplated therein. Globe Refining Company v. Landa Cotton Oil Company, 190 U. S. 540, 543. The fact that a condition encountered, which causes delay, is unforeseen or unanticipated does not render the delay unavoidable and is not enough to relieve the contracting party, whose contractual duty it is to overcome it, from responsibility for damages to the other party from the delay caused by such condition. Carnegie Steel Co. v. United States, 49 C. Cls. 403, affirmed 240 U. S. 156. We are of opinion that plaintiff's contract and specifications as a whole, and particularly articles 4 and 13, when considered in connection with the Government's statements and representations set forth in the specifications relating to construction of the hospital building, require the conclusion that the Government was not relieved of responsibility for such of plaintiff's excess costs as did not result from a cause for which plaintiff was responsible and which plaintiff was not required, in making its bid, to take into consideration.

In the specifications and drawings supplied to all bidders, the Government showed and indicated the conditions under which

the work with which all parties were directly or indi-
42 rectly concerned would be performed. In these specifications and drawings and in art. 4 of the standard form of contract the Government, in effect, represented to all bidders, including plaintiff, that in making their bids they should not take into consideration costs or expense of performance by reason of delay or extra work which might result from discovery by the Government of subsurface or latent conditions at the site of the work materially differing from those shown on the drawings or indicated in the specifications; and that if such changed conditions should be encountered, the Government, through its contracting officer, would make an equitable adjustment in the amount due under the contract and in the time required for its performance so as to take care of any increase or decrease in the cost of performance resulting from such changed conditions. We think, in the circumstances, the fact that the Government encountered and discovered conditions materially differing from those contemplated and shown in its drawings and specifications in connection with its work of constructing the building in which plaintiff was to perform its work did not relieve the defendant of the duty, under plaintiff's contract, of making an equitable adjustment so as to increase the amount due under plaintiff's contract to take care of plaintiff's increased cost of performance resulting from and attributable to such changed conditions. Plaintiff had been notified prior to June 4, 1932, that the construction work would be ready for plaintiff to begin its work by that date. Plaintiff immediately shipped all its tools and several carloads of material to the site, and employed a superintendent and sent him to the job. The contracting officer ordered the construction work stopped for a period of sixty-five (65) days, and finally moved the location of the building. This delayed the construction of the foundations five months and twenty-four days. During this time plaintiff could do no work, although it had to keep its superintendent on the job and its overhead expense was accruing. Plaintiff timely protested to the contracting officer that it should not be required to proceed with the work called for by its contract at the price stated therein by reason of the delay
and under the circumstances and condition which had
43 arisen, and insisted that the contracting officer should make an equitable adjustment increasing the amount otherwise due under its contract so as to meet the new and changed conditions which had been and would be encountered in its performance. The contracting officer, while not denying the claimed effect upon plaintiff's performance, refused to make any adjustment and, in so refusing, we think he failed to perform the duty required of him under art. 4 of the contract. It should be noted here that

the contracting officer did make an adjustment in plaintiff's contract in favor of the Government of a net decrease of $1,121 in the amount due under plaintiff's contract by reason of the elimination of certain work because of the changed conditions encountered which necessitated the relocation of the building. It seems obvious that the adjustment, in order to be equitable as contemplated in the contract, should have taken into consideration as well the then known and clearly contemplated increased performance costs of plaintiff by reason of the same conditions. The changed conditions affected plaintiff's performance and costs in much the same way as they affected the performance and costs of the defendant's construction contractor, but in a lesser degree. Nevertheless, the plaintiff got nothing for its increased costs and the construction contractor was given an increase of $68,360.57 as an equitable adjustment "for extra work and delay" due to the changed conditions encountered.

In these circumstances and for the reasons hereinbefore stated, it becomes the duty of the court to determine and allow plaintiff the amount which will compensate it for the excess costs incurred and paid by it by reason of delay in performance of the work under conditions which rendered it more expensive than it otherwise would have been. We have found from the evidence submitted that this excess cost is $9,349.95, made up of superintendent's salary and agreed overhead expense from June 4, 1932, the date on which plaintiff had been notified it could begin its work, to October 8, 1932, the date on which the building construction work was first ready for commencement by plaintiff of its work, and increased labor costs resulting from inefficiency of laborers who had to perform their work in the open, during the cold and
44 winter weather of 1932–1933, rather than in an enclosed building as originally contemplated by the parties to the contract.

With reference to the further excess costs amounting to $3,073.08, representing wages of the superintendent and foremen, and overhead expense for the delay period of 48 days after the extended date of August 14, 1933, for completion, the evidence shows and the defendant's contracting officer found that plaintiff was as much responsible for this delay as was the defendant's contractor for the general construction and, therefore, extended the time for each of the contractors from August 14 to October 1, 1933. Plaintiff is therefore not entitled to recover this cost.

The balance of $13,621.61 of the total loss of $26,044.64 sustained by plaintiff under its contract appears from the evidence of record to have been the result of inadequate estimates by plaintiff for costs of direct labor and materials for heating and plumbing and its inability, due to its financial condition, to take advantage

of certain discounts for prompt payments on materials purchased and installed in the building. We need not determine whether under all the circumstances the plaintiff would be entitled to recover on account of loss of discounts for the reason that the proof does not show the exact amount which plaintiff was required to pay for materials, by reason of its inability to take advantage of allowable discounts through prompt payments for materials purchased. In these circumstances, this portion of the total excess cost of $26,044.64 is clearly not recoverable.

Judgment will be entered in favor of plaintiff for $9,349.95. It is so ordered.

Concurring opinion

GREEN, Judge, concurring:

I concur in the opinion of Judge Littleton but wish to add some observations on the case.

The defense of the defendant as set forth in its brief seems to be based largely upon the fact that the construction of the building itself was let by the defendant to another contractor and that the defendant consequently was not responsible for any delays
45 in its erection. I think the opinion of Judge Littleton shows very clearly that this is no defense under the circumstances of the case and that the authorities cited by defendant's counsel are not applicable to the situation which we have before us. I would, however, go farther than this.

As the stoppage of the work was caused by the orders of the defendant's authorized agent, the construction officer, the defendant was directly responsible for the stoppage and the consequences which followed from it. Plaintiff's contract with defendent fixed a time for the completion of the building and the work of plaintiff. After the contract had been entered into, the defendant, through its construction officer, by written notice, called plaintiff's[1] attention to this requirement. The time for completion was one of the specifications of the contract and there is always an implied warranty that the specifications are adequate for the work to be done. See United States v. Spearin, 248 U. S. 132, 136, where this rule is laid down. When the defendant ordered the work stopped, and continued its stoppage for the period stated in Judge Littleton's opinion, it obviously changed the contract and by this breach became liable for the damage caused to plaintiff by this act. But if the defendant be not held directly liable, it is clearly liable under Articles 3 and 4.

It makes no difference, however, in the amount of plaintiff's recovery whether the defendant be held liable directly for the

[1] The word "plaintiff" is used in this opinion as referring to either plaintiffs' predecessor or the nominal plaintiffs in the case.

stoppage, or be held liable under Articles 3 and 4 of the contract.

Plaintiff's contract provided in substance in Article 3 that the contracting officer might make changes in the drawings and specifications of the contract within the general scope thereof, and also provided in substance in Article 4 that if the Government discovered in the progress of the work subsurface conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the contracting officer could
46 make such changes in the drawings and specifications as he might find necessary. But if it should be held that these provisions authorized the change in the contract which the contracting officer made, they do not relieve the defendant of responsibility, for the same articles also provided in substance that in the event the contracting officer should make a change in accordance therewith which increased the cost of the work or the time of its performance, that an equitable adjustment should be made with the contractor. The contracting officer did make an equitable adjustment with the building construction contractor increasing the price for building construction work in the amount of $68,360.50 for extra work and delay, but refused to make any adjustment with the plaintiff for increased costs notwithstanding plaintiff's objections and protests against his action and stated in substance that no adjustment could be made under the contract as no actual construction work had been performed by the plaintiff at the time the change was made. This decision was erroneous. If either Articles 3 or 4 are applicable under the facts in the case, the refusal of the contracting officer to make an adjustment was a violation of the contract and made the defendant liable to plaintiff for the injury or damage done by the change made. The measure of plaintiff's recovery would then be the same as it would be if plaintiff was held directly liable for the stoppage of the work.

It has been urged as a defense to plaintiff's action that the change made was not the fault of anyone but simply resulted from unforeseen conditions. I am of the opinion that the fact that the change made was necessary and that the cause thereof was unforeseen is no defense even if it should be held that it was not the fault of anyone that the defects in the site were not discovered earlier. See United States v. Thomas, 15 Wall. 337, 339, 348.

In my view, the defendant breached the contract in changing it to the injury and damage of plaintiff at a time when plaintiff was ready to perform it and would, if permitted, have completed it in accordance with the terms to which the parties had agreed. This is sufficient to entitle the plaintiff to recover.

47 *Concurring opinion*

WHALEY, Chief Justice: I concur in the part of this opinion which holds that plaintiff is entitled to actual damages resulting from the stoppage of work by order of the defendant. I do not believe Articles 3 and 4 have any application.

JONES, Judge, concurs in this statement.

Dissenting opinion

MADDEN, Judge, dissenting:

I do not agree with the opinion of the Court. In my discussion I shall use the word "plaintiff" to refer either to the receivers who are here suing as such, or to the contractor who made the contract and did the work. The context will show which is meant.

Plaintiff's theory of recovery is stated in their reply brief as follows:

* * * Plaintiffs' claim is predicated upon a delay of 212 days caused by the Government, resulting primarily from the discovery of faulty foundations which necessitated the drawing of new plans and complete relocation of the Hospital building.

There is no claim that anyone was at fault in failing to discover sooner the faulty foundations, but it is plaintiffs' position that the delay resulting therefrom, which made the cost of performance greater than had been expected, was a breach of contract on the part of the defendant, entitling plaintiffs to recover the additional cost. Ordinarily, the fact that the performance of one of the parties to a contract is made more difficult or expensive by supervening circumstances does not excuse him from performing. See 6 Williston, Contracts, sec. 1963, p. 5504; Maryland Dredging Co. v. United States, 47 C. Cls. 557. Nor does it entitle him to additional compensation. Day v. United States, 245 U. S. 159.

Plaintiffs' claim then depends upon whether there is anything in the contract here involved to take it out of the general rule. The question should be, not as the majority opinion states, whether under the terms of the contract "the defendant was relieved of responsibility for or liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way
48 responsible," but whether under the terms of the contract, the defendant should be held to have assumed responsibility to compensate plaintiff for excess costs due to delay which was no one's fault.

The defendant did not agree to have the building ready for the contractor who was to install the plumbing, heating, and

wiring at any fixed time, and from the specifications and contract, plaintiff must have known that its time of performance was dependent upon the progress of the building contractor. The specifications clearly directed its attention to the contract for general construction and advised it that its contract was to be performed in harmony with the other work on the building. Article 1 of the contract provided that the work under it was to be completed "at a date not later than that provided for in the contract for General Construction," but there was no promise on the part of the defendant as to when that date would be. Plaintiff must have known that the government reserved the power to make changes in the builder's contract, as well as in its own, and that exercise of that power would necessarily cause delay. Cf. H. E. Crook Co. v. United States, 270 U. S. 4; Gertner, Sr., v. United States, 76 C. Cls. 643.

Article 4 of the contract provided that if the government should discover, or the contractor encounter, unexpected conditions at the site materially differing from those shown in the drawings and specifications, the contracting officer should make the necessary changes in the plans and any necessary changes in the amount of compensation and time for performance. This provision seems to me to have reference only to the contractor whose work is directly affected by the discovery of the unexpected condition. Nor does plaintiff appear to have understood the provision in any other sense, for no reliance is placed on article 4 in its briefs. If plaintiff had made its contract under such circumstances that it and the agents of the government expected that the work would be done in the winter, plaintiff and other bidders would have estimated for a high labor cost. If, then, the building contractor had been delayed due to unforeseen conditions, so that plaintiff's work was done in the summer, it would have profited accordingly and the defendant could not, under the contract, have denied it that profit. I think
49 this risk of gain or loss is not removed by article 4, except as to the contractor who actually encounters the unforeseen condition.

The statement of the contracting officer to plaintiff that construction would begin in early spring so that the building would be under roof before cold weather set in appears to have been a truthful statement of a reasonable expectation at the time he spoke, but hardly a promise on the part of the government that what he said would be accomplished, regardless of intervening circumstances or events.

The provision in article 9 of the contract that the contractor's right to proceed to perform the contract and to be paid without

the deduction of liquidated damages for delay should not be prejudiced by delays due to "unforeseeable causes beyond the control and without the fault or negligence of the contractor" seems to show that neither party was to be charged with breach of contract merely for delays due to such causes. Plaintiff was, as it should have been, granted an extension of time and excused from liquidated damages. That was all that it was entitled to under its contract.

51 *VI. Judgment of the court*

December 1, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover.

It is therefor adjudged and ordered that plaintiffs recover of and from the United States nine thousand three hundred forty-nine dollars and ninety-five cents ($9,349.95).

53 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. 46310. Court of Claims. Term No. 982. The United States, Petitioner vs. Fred J. Rice and W. Cameron Burton, Receivers for D. C. Engineering Company, Inc. Petition for a writ of certiorari and exhibit thereto. Filed February 27, 1942. Term No. 982 O. T. 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed April 13, 1942.

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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